

Rules and Regulations Implementing The Telephone Consumer Protection Act of 1991

COMMENTS OF THE AMERICAN TELESERVICES ASSOCIATION

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of:

)
) CG Docket No. 05-338
)

*Rules and Regulations Implementing
The Telephone Consumer Protection Act of 1991*

COMMENTS OF THE AMERICAN TELESERVICES ASSOCIATION

The American Teleservices Association ("ATA") respectfully submits these comments in response to the Commission's proposed rulemaking implementing the Junk Fax Prevention Act of 2005 ("Act") published on December 19, 2005. In the event the Commission is inclined to limit the time period during which a marketer may transmit an advertisement by facsimile to an individual or business with whom the marketer has an established business relationship ("EBR"), ATA encourages the Commission to impose the same limits as the Commission imposed on telemarketers' ability to initiate telephone solicitations to those consumers with whom they have an EBR.

I. Overview

ATA is a national trade organization with an industry-wide membership that collectively produces over \$500 billion in annual sales. It is the only national trade association that is exclusively devoted to the teleservices industry. ATA's member organizations represent all facets of the teleservices industry, and provide traditional and innovative services to Fortune 500 companies, nonprofit organizations, charitable institutions and organized political parties. Many ATA members initiate facsimile transmissions to market their products and services to individuals and businesses with which they have an EBR.

II. Discussion

The Telephone Consumer Protection Act of 1991 ("TCPA") prohibits any party from transmitting an unsolicited advertisement to a telephone facsimile machine. 47 U.S.C. §227(b)(1)(C). The TCPA instructed the FCC to enact regulations to implement this prohibition. 47 U.S.C. §227(b)(2). In its Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 dated September 17, 1992 ("1992 Rulemaking"), the FCC echoed the TCPA's prohibition on unsolicited facsimiles, 47 C.F.R. §64.1200(a)(3). However, in doing so, the FCC specifically ruled:

We note, however, that facsimile transmission from persons or entities who have an established business relationship with the recipient can be deemed to be invited or permitted by the recipient.

7 F.C.C.R. 8752, 8789 (Para 54, fn 87, September 17, 1992).

In its 1992 Rulemaking, the Commission defined an "established business relationship," in pertinent part, as a "voluntary two-way communication, with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction regarding products or services offered by the entity." 47 C.F.R. §64.1200(f)(4). However, in its Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 dated July 25, 2003 ("2003 Rulemaking"), the FCC sought to eliminate the inference of "invitation" or "permission" created by the established business relationship ("EBR"). 68 F.R. 44144, 44158 ("The Commission has also reversed its prior conclusion that an "established business relationship" provides the necessary permission to deliver unsolicited facsimile advertisements.).

Prior to the effective date of that part of the Commission's 2003 Rulemaking that would have eliminated the inference, Congress enacted the Act. Section 2(a) of the Act amended section 227(b)(1)(C) of the TCPA by codifying an EBR exemption to the TCPA's prohibition on the transmission of unsolicited facsimile advertisements. Section 2(b) of the Act defines EBR in the same manner as defined in 47 C.F.R. §64.1200 in effect on January 1, 2003.

In the Commission's 2003 Rulemaking, the Commission amended its EBR definition by limiting the duration of the exemption to three (3) months following an application or inquiry or eighteen (18) months following a purchase or transaction. 47 C.F.R. §64.1200(f)(3).

In this proposed rulemaking and as authorized by Section 2(f) of the Act, the Commission seeks comments on whether, and to what extent, it should limit the duration pursuant to which a marketer may transmit an unsolicited facsimile advertisement to an individual or business with which it has an EBR. The Commission also seeks comments regarding whether any such limitation should be similar to the limitation the Commission imposed on the duration of the EBR in the context of telephone solicitations.

The permissible time period during which a marketer may transmit an unsolicited facsimile advertisement to an individual or business with whom it enjoys an EBR is of great importance to ATA. The Commission's determination in this rulemaking has broad implications for ATA's members and all entities that engage in direct marketing, regardless of the avenue of communication.

First and foremost, ATA does not specifically endorse the imposition of time limits on the duration of the EBR in the context of facsimile advertisements. However, to the extent the Commission intends to impose such limits, ATA urges the Commission to enact the same limits that it imposed with respect to telephone solicitations in its 2003 Rulemaking.

Prior to the publication of its 2003 Rulemaking, the Commission received and reviewed extensive comments from industry representatives and the public alike regarding the permissible time period during which a telephone solicitor should be able to rely upon an EBR to initiate a telemarketing call to a telephone number on the national Do-Not-Call Registry. Based upon these comments, the Commission created the 18/3-month limitation discussed previously. The Commission concluded that this limitation strikes an appropriate balance between industry practices and consumers' privacy interests. Specifically with respect to the previous transaction prong, the Commission ruled:

[B]ased on the range of suggested time periods that would meet the needs of industry, along with consumers' reasonable expectations of who may

call them and when, eighteen (18) months strikes an appropriate balance between industry practices and consumers' privacy interests.

68 FR 44144, 44158.

The duration of the EBR exemption from the Act's prohibition on the transmission of facsimile advertisements should be no different than that which the Commission imposed in the context of telephone solicitations -- The marketer's avenue of communication should not affect the duration of the exemption. Indeed, there is no information or data to suggest that the subjective expectations of businesses and consumers in receiving marketing materials from entities with which they have previously transacted business varies in any way depending upon the marketer's mode of communication.

Furthermore, uniformity in regulation will mitigate the compliance burden and risk for businesses of all sizes and will decrease the likelihood of confusion amongst both businesses and consumers. By enacting similar restrictions on fax marketers and telephone solicitors, companies which engage in both forms of marketing may utilize their existing compliance practices and procedures (e.g., call blocking, list scrubbing, etc.) to suppress calls to customers whose EBRs have lapsed; presumably little additional software programming or configurations will be necessary to comply with the limitation. On the other hand, if the Commission enacts EBR limitations for fax marketing that differ from those implemented in the context of telemarketing, marketers will be forced to double their compliance efforts.

Consumers, too, will benefit by the imposition of uniform limitations on the EBR exemption. Given that the TCPA provides consumers with a private right of action against fax marketers and telemarketers for violations of the TCPA and the FCC's implementing rules, consumers will be better able to analyze potential claims with less confusion by considering a uniform time limitation that applies across both communications channels.

By virtually all accounts, the limits that the Commission imposed on the duration of the EBR exemption in the context of telemarketing effectively balances the privacy interests of consumers with the legitimate business interests of telephone solicitors. ATA is aware of no empirical evidence to suggest otherwise, nor has the Commission indicated that it is in receipt of a significant number of complaints, data, etc. that suggest that the duration of the EBR in the context of telemarketing should be modified. Without such empirical data, there is no reason for the fax and telemarketing EBR provisions to differ.


III Conclusion

For these reasons, ATA suggests that, in the event the Commission opts to limit the duration of the EBR exemption from the prohibition on transmitting unsolicited facsimile advertisements, the Commission impose identical limitations as it did in the context of telephone solicitations, namely eighteen months following a purchase or transaction and three months after an application or inquiry.

Respectfully submitted,

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